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DEPARTMENT OF STATE

[Public Notice: 9220]

22 CFR Part 35

RIN: 1400-AD85

Program Fraud Civil Remedies

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: The Department of State is updating its regulations regarding its implementation of the Program Fraud Civil Remedies Act of 1986, to remove a conflict between the “reviewing official” and the “authority head” as defined by the implementing regulations.

DATES: This rule is effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Alice Kottmyer, Attorney-Adviser, Office of the Legal Adviser, (202) 647-2318, or kottmyeram@state.gov.

SUPPLEMENTARY INFORMATION:

The Program Fraud Civil Remedies Act of 1986, 31 U.S.C. 3801 *et seq.* (the Act), outlines a procedure for establishing administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false fictitious, or fraudulent claims or written statements

to authorities or to their agents; and specifying the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments. In a nutshell, the “investigating official” (who is in the Office of the Inspector General) presents a case to the “reviewing official” (currently defined as the Chief Financial Officer) who, if appropriate, forwards the case to the Department of Justice. The Department of Justice will approve a “claim” if it believes further action is warranted. The reviewing official serves the claim on the respondent. There is a hearing before an administrative law judge (ALJ), and a disposition adverse to the respondent can be appealed to the “authority head,” defined in the rule as the Under Secretary for Management.

Currently, the Under Secretary for Management is designated by the President as the Chief Financial Officer for the Department of State. Therefore, he is the reviewing official as well as the authority head, which of course is unacceptable. This rule corrects that anomaly, by defining the “reviewing official” as the Assistant Legal Adviser for Buildings and Acquisitions (hereinafter, “the ALA”). The Under Secretary for Management remains the authority head.

The Act (in 31 U.S.C. 3801(a)(8)) outlines the qualifications for the reviewing official, all of which are met by the ALA. (1) He or she must be designated by the authority head to make the determination under 31 U.S.C. 3803(a)(2) to send the case to the Department of Justice for its review and action, if appropriate. (2) He or she must be serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule; the ALA is a member of the Senior Executive Service, and thus has a rate of pay at least as high as GS-16, a grade which was eliminated under the provisions of the Civil Service Reform Act of 1978. (3)

He or she must not be subject to supervision by, or required to report to, the investigating official, and not employed in the organizational unit of the authority in which the investigating official is employed; the ALA is not in the Office of the Inspector General and is not (nor will he or she ever be) subject to the supervision of anyone in that office.

Accordingly, 22 CFR 35.2(r), the definition of “reviewing official,” is changed by this rulemaking.

Regulatory Findings:

Administrative Procedure Act

This regulation amends a “rule of agency organization, procedure, or practice”, which is not subject to the notice-and-comment rulemaking procedures set forth in 5 U.S.C. 553. See 5 U.S.C. 553(b). Therefore, the Department is issuing this amendment as a final rule.

Regulatory Flexibility Act/Executive Order 13272: Small Business.

Because this final rule is exempt from notice and comment rulemaking under 5 U.S.C. 553, it is exempt from the regulatory flexibility analysis requirements set forth by the Regulatory Flexibility Act. Nonetheless, consistent with the Regulatory Flexibility Act, the Department certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, generally requires agencies to prepare a statement before proposing any rule that may result in an annual expenditure of \$100 million or more by State, local, or tribal

governments, or by the private sector. This rule will not result in any such expenditure, nor will it significantly or uniquely affect small governments.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by 5 U.S.C. 804. The Department is aware of no monetary effect on the economy that would result from this rulemaking, nor will there be any increase in costs or prices; or any effect on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and import markets.

Executive Orders 12866 and 13563

The Department of State has reviewed this rule to ensure its consistency with the regulatory philosophy and principles set forth in Executive Orders 12866 and 13563, and has determined that the benefits of this regulation outweigh any cost. The Department does not consider this rule to be a economically significant rulemaking action.

Executive Orders 12372 and 13132: Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. The rule will not have federalism implications warranting the application of Executive Orders 12372 and 13132.

Executive Order 12988: Civil Justice Reform

The Department has reviewed the regulation in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175

The Department of State has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rulemaking.

Paperwork Reduction Act

This rule does not impose or revise information collection requirements under the provisions of the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

List of Subjects in 22 CFR Part 35

Administrative practice and procedure, Claims, Fraud, Penalties.

For the reasons stated in the preamble, amend part 35 of title 22 of the Code of Federal Regulations as follows:

PART 35 – PROGRAM FRAUD CIVIL REMEDIES

1. The authority citation for part 35 is revised to read as follows:

Authority: 22 U.S.C. 2651a; 31 U.S.C. 3801 et seq.

2. Revise §35.2(r) to read as follows:

§ 35.2 Definitions.

* * * * *

(r) *Reviewing official* means the Assistant Legal Adviser for Buildings and Acquisitions or her or his designee who is—

- (1) Not subject to supervision by, or required to report to, the investigating official;

- (2) Not employed in the organizational unit of the authority in which the investigating official is employed; and
- (3) Serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule.

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August 3, 2015. _____

(Date)

Patrick F. Kennedy
Under Secretary of State for Management
Department of State

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